No. 91-589

In the Supreme Court of the United States

OCTOBER TERM, 1991

GAF CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts correctly held that there was no genuine issue of material fact on petitioner's claim that the Navy breached a duty to disclose "superior knowledge" of asbestos hazards in the course of purchasing asbestos insulation from petitioner, a leading manufacturer of asbestos products.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 932 F.2d 947. The opinion of the Claims Court (Pet. App. 18a-46a) is reported at 19 Cl. Ct. 490.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on May 8, 1991. A petition for rehearing was denied on June 11, 1991. Pet. App. 48a-49a. The Chief Justice extended the time in which to file a petition for a writ of certiorari to and including October 9, 1991 (Pet. App. 52a), and the petition was filed on October 8, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner GAF Corporation is the successor to the Ruberoid Company, which entered the asbestos business in the late 1920s. During the 1930s, Ruberoid became familiar with some of the hazards of exposure to asbestos dust because it was involved in a number of lawsuits brought by its own employees, who alleged that they had suffered asbestos-related injuries. By 1937, Ruberoid was an industry leader, with net sales of more than $16 million per year, a product line that included a "wide range" of asbestos insulation products, and "a long list of commercial customers of its products." Pet. App. 25a-27a.

Beginning in 1944 and continuing for about 20 years, Ruberoid sold asbestos insulation to the Navy. Due to prolonged exposure to petitioner's products, many civilian shipyard workers employed by the Navy contracted asbestos-related diseases and obtained recoveries from petitioner.[1] Petitioner subsequently brought this contract action against the United States pursuant to the Tucker Act, 28 U.S.C. 1491. Petitioner sought contribution or indemnity from the government on the ground, among others, that "the Government breached a duty to disclose 'superior knowledge' of asbestos hazards." Pet. App. 2a-3a.

2. The Claims Court granted summary judgment in favor of the United States.

a. The Claims Court first recognized that a special five-judge panel of the Federal Circuit had af-

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[1] Since the employees were eligible for no-fault compensation from the government under the Federal Employees' Compensation Act, they were barred from bringing any tort actions against the government. 5 U.S.C. 8116(c).

firmed the grant of summary judgment in favor of the government on a similar claim in *Lopez* v. *A.C. & S., Inc.*, 858 F.2d 712 (1988), cert. denied, 491 U.S. 904 (1989). In *Lopez*, the Federal Circuit held that Eagle-Picher and Raymark, two other manufacturers that sold asbestos insulation to the Navy, had failed to establish that the government breached an implied contractual duty to advise them of the government's knowledge concerning the health risks of exposure to asbestos.

Because *Lopez* was decided on summary judgment, the Federal Circuit noted in that case that it had "to suppress [its] wonderment that anyone could have known more about the hazards of asbestos than those responsible companies who used it as raw material in the production of insulation." 858 F.2d at 717. Nevertheless, on the assumptions that "the government did know things it did not reveal, and that it used a defective product in ways that added to the hazard, but were not known to suppliers," the court dismissed the manufacturers' claim that the government had breached an implied duty to disclose superior knowledge. *Ibid.* Applying the federal common law test previously established by the Court of Claims, the Federal Circuit explained that the government is liable on a "superior knowledge" theory only if, among other things, "a contractor (1) undertakes to perform without vital knowledge of a fact that affects performance costs or direction, (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information, [and] (3) any contract specifications supplied misled the contractor, or did not put it on notice to inquire." *Ibid.* (emphasis added). The government had not breached a duty to inform asbestos manufacturers of

the hazards of their products under that test, the Federal Circuit held, because "[t]he government might reasonably suppose Raymark and Eagle-Picher knew enough about asbestos and its perils not to need to learn more about it from the government." *Ibid.*

The Federal Circuit in *Lopez* added that the contention that the buyer owed the sellers "a duty to tell them their product was defective, intrinsically or as actually used[,] * * * is new to the 'superior knowledge' doctrine and does not fit it at all well." 858 F.2d at 717. In that connection, the court noted that the asbestos manufacturers asserted "not only a duty of the customer to inform the supplier that his product is defective, but a duty to find out what he does not already know" about his product. *Id.* at 718. "This does not fit the superior knowledge doctrine and cases exactly like a glove," the court concluded. *Ibid.*

Furthermore, in its decision in *Lopez* the Federal Circuit noted that the asbestos manufacturers would not have been found liable to the injured shipyard workers unless it was determined that the manufacturers knew of the dangers of asbestos but failed to warn of those dangers. 858 F.2d at 718; see Restatement (Second) of Torts § 402A, comment j (1965). Nor would the manufacturers have been held liable if they had simply produced asbestos products in conformity to government specifications and had warned the United States of dangers in the use of the product that were known to the manufacturers but not to the government, since they would then have been immune from liability under the government contractor defense. 858 F.2d at 718; see *Boyle* v. *United Technologies Corp.*, 487 U.S. 500,

512 (1988). But the manufactures had been held liable in tort to many shipyard workers, a fact which the Federal Circuit found "logically inconsistent" with their contract claims. 858 F.2d at 718. The court found this to be "a factor counseling caution when we are asked to extend Tucker Act liability on new and novel grounds, only superficially based on case law as known hitherto." *Ibid.*

b. Applying *Lopez*, the Claims Court found that "the crux of an actionable superior knowledge claim is a showing by a contractor that the Government has reason to believe that a contractor was not already knowledgeable." Pet. App. 31a. The court granted summary judgment in favor of the government because, as in *Lopez*, the contractor failed to rebut the showing that the customer did not have any reason to believe that an industry leader such as petitioner was ill-informed about its own products. Petitioner attempted to distinguish the facts in this case from *Lopez* by claiming that classified studies showed that the government had reason to know that Ruberoid was not aware of the risk of exposure to finished asbestos products. But "taken in their most favorable light, *i.e.*, that least favorable to the Government," the Claims Court concluded that the documents on which petitioner relied merely supported the proposition that "the Government was aware of asbestos hazards in the shipyards." Pet. App. 34a n.2. Since "the *Lopez* court rejected the concept of the duty of the customer to inform the supplier that the latter's product was defective when the supplier is an experienced producer of asbestos products," *id.* at 42a, the Claims Court refused to extend the superior knowledge doctrine beyond its common law elements and hold that the government had an implied contractual

duty to determine what petitioner knew about its products and advise it of what the government knew, as well.

3. The Federal Circuit affirmed. Pet. App. 1a-15a. "Construing factual inferences in GAF's favor, the Claims Court correctly determined that GAF's showings did not create a triable issue." *Id.* at 5a. The appellate court concluded that "Ruberoid was an experienced asbestos supplier" and that petitioner, "like the asbestos producers in *Lopez*, in effect asserted 'not only a duty of the customer to inform the supplier that his product is defective, but a duty to find out what he [the supplier] does not already know.'" *Ibid.*, quoting 858 F.2d at 718. Since "[t]he Claims Court found that the Government had no reason to believe that Ruberoid lacked knowledge about asbestos hazards," the Federal Circuit held that petitioner "stumbles on the same hurdles in the superior knowledge doctrine that the producers in *Lopez* could not surmount." Pet. App. 5a.[2]

The Federal Circuit denied petitioner's request for rehearing and suggestion of rehearing en banc. Pet. App. 48a-51a.

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[2] Judge Newman dissented from the grant of summary judgment. In her view, the classified studies showing that the government had some awareness of the risks of exposure to asbestos distinguished this case from *Lopez*. While she could not "define the precise line beyond which there would always be an obligation of the government to disclose information that it knows, or is charged with knowing," she thought that petitioner "is entitled to the opportunity to develop facts that could support its theory that the government had an obligation to disclose certain knowledge." Pet. App. 13a, 15a.

ARGUMENT

Petitioner erroneously asserts that the Federal Circuit departed from prior government contract law by affirming the dismissal of its claim. In fact, both lower courts conducted a thorough examination of the extensive factual record and concluded that summary judgment was required under the traditional elements of the superior knowledge doctrine. There is no need for this Court to reevaluate the application of this settled legal doctrine to the facts of this case. Although petitioner also sought to have the Federal Circuit extend the "superior knowledge" rule beyond its traditional elements, that issue also does not warrant review. The Federal Circuit reasonably decided, in an area of the law that Congress has committed to its oversight, not to hold that the government has a duty of inquiry to ascertain what an experienced vendor knows about the hazards of its own products.

1. The superior knowledge rule was fashioned by the Court of Claims (the predecessor to the Federal Circuit) in an area of law committed to the expertise of that court—government contracting. See *Amell* v. *United States*, 384 U.S. 158, 166 (1966) ("[t]he Court of Claims * * * serves as a centralized forum for developing the law" under the Tucker Act); *Ingersoll-Rand Co.* v. *United States*, 780 F.2d 74, 78 (D.C. Cir. 1985) (the "issues raised * * * are within the unique expertise of the Court of Claims [and call] for knowledge of the government contracting process"). The superior knowledge rule emerged because the Court of Claims was presented with cases in which contractors claimed additional expenses due to the "nondisclosure to a bidder at the time of his bid of information essential to successful performance," where the government "was aware the contractor had

no knowledge of [the information] and had no reason to obtain such information." *Lopez*, 858 F.2d at 717. Since, in such a circumstance, the withholding of information by the government increased the cost of completing the contract, the Court of Claims determined that the contractor should not have to bear the increased cost. See *American Ship Building Co.* v. *United States*, 654 F.2d 75, 79 (Ct. Cl. 1981).

However, as petitioner acknowledges, Pet. 10 n.8, the superior knowledge rule has traditionally been applied only where the government is aware that the contractor does not know the facts that may increase its costs and the contractor had no reason to obtain the information. Both lower courts in this case examined the factual record and concluded, as the Federal Circuit stated, "that the Government had no reason to believe that Ruberoid lacked knowledge about asbestos hazards." Pet. App. 5a. Thus, the lower courts correctly concluded that petitioner had failed to establish the elements of a superior knowledge claim. Moreover, the "superior knowledge" cases, including those cited by petitioner, *all* involved costs directly connected to contract completion. *None* involved claims for reimbursement for a contractor's tort liability, which (as in this case) is typically incurred long after completion of the contract.

Thus, the superior knowledge rule has *never* been applied to a situation like this one, where the government had no reason to think that petitioner was not familiar with the hazards of its products. Indeed, the superior knowledge rule has not been applied in any case where (1) the government purchased from an experienced manufacturer a product no different in any pertinent respect from those sold commercially by that manufacturer; (2) the losses were incurred

by the manufacturer long after completion of the contract; and (3) the losses were tort payments made by the manufacturer to persons exposed to its product. Accordingly, petitioner's basic proposition—that this case presents "a departure from the established superior knowledge doctrine," Pet. 9—is baseless. To the contrary, petitioner seeks to extend the superior knowledge rule far beyond any case in which the Federal Circuit or the Court of Claims has found it applicable. As the Federal Circuit stated in *Lopez*, the contention that the government, as buyer of asbestos insulation, owed the manufacturers "a duty to tell them their product was defective, intrinsically or as actually used * * * is new to the 'superior knowledge' doctrine." 858 F.2d at 717.

2. As the Federal Circuit also stated in *Lopez*, petitioner's contention "does not fit [the superior knowledge rule] at all well," 858 F.2d at 717, and the court therefore properly declined to extend the superior knowledge rule to this case. As an initial matter, petitioner's argument that the rule should apply here is belied by the results of the tort cases underlying its claim. That is, petitioner essentially asserts that it was an innocent bystander who happened to sell a dangerous product to the government, the party that knew of the dangers. But if that were so, petitioner would not have been held liable to the shipyard workers who were injured as the result of exposure to the asbestos in its products. As the Federal Circuit recognized in *Lopez*, petitioner would not have been held liable to the shipyard workers unless it knew of the dangers of exposure to its products and failed to warn of them. 858 F.2d at 718; see Restatement (Second) of Torts § 402A, comment j (1965). Similarly, petitioner would have been protected from

liability by the government contractor defense if it had merely produced asbestos products for the government in conformity with government specifications and had warned the government of the dangers in the use of the product that were known to it but not to the government. *Boyle*, 487 U.S. at 512; 858 F.2d at 718.[3]

Furthermore, the extension of the superior knowledge rule requested by petitioner is essentially indistinguishable from its now-discarded "reverse warranty" claim. That is, petitioner asserts that the government impliedly agreed to indemnify it for any tort liability petitioner might incur as a result of the shipyard workers' exposure to its products because, it contends, the government failed to advise it of the hazards of its products. But the Federal Circuit recognized "the bizarre and novel nature of the 'reverse warranty'" argument, *Lopez*, 858 F.2d at 716: *buyers* do not customarily make warranties to *sellers*, and it would be pure fiction to conclude that the government made any warranties to petitioner when it purchased petitioner's asbestos insulation. Any remedy petitioner may have against the government would lie in tort, not in contract.[4]

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[3] As it did in its petition for rehearing, petitioner ignores the fundamental inconsistency of its position with the government contractor defense. Since the roots of the government contractor defense go back a half-century, see *Boyle*, 487 U.S. at 505-506, petitioner cannot argue that the defense was unavailable to it prior to *Boyle*. In fact, petitioner asserted the defense (and successfully resisted plaintiffs' efforts to have it stricken as a matter of law) prior to filing this case. See *In re Related Asbestos Cases*, 543 F. Supp. 1142, 1151 (N.D. Cal. 1982).

[4] We do not mean to suggest that petitioner or parties similarly situated have tort remedies against the government. In

Moreover, an extension of the superior knowledge rule would be particularly inappropriate here. Petitioner contends not only that the government had "a duty to inform the supplier that his product is defective," but also "a duty to find out what [the supplier] does not already know," 858 F.2d at 718, even though "[t]he Government had no reason to believe experienced asbestos producers lacked knowledge of the product's risks," Pet. App. 4a. The Federal Circuit reasonably declined to extend the superior knowledge rule so dramatically.

3. Petitioner acknowledges that "[t]he Federal Circuit is the sole interpreter of federal government contract law, subject only to review by this Court." Pet. 8. The fact that Congress has centralized review of Tucker Act claims in the Federal Circuit and has

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fact, the courts of appeals have, by and large, held to the contrary. See *Bush* v. *Eagle-Picher Industries, Inc.*, 927 F.2d 445 (9th Cir. 1991); *Eagle-Picher Industries, Inc.* v. *United States*, 846 F.2d 888 (3d Cir.), cert. denied, 488 U.S. 965 (1988); *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir. 1985), cert. denied, 476 U.S. 1126 (1986); *In re All Maine Asbestos Litigation (BIW Cases)*, 854 F.2d 1328 (Fed. Cir. 1988) (Table), aff'g 655 F. Supp. 1169 (D. Me. 1987); but see *Eagle-Picher Industries, Inc.* v. *United States*, 937 F.2d 625, 641 (D.C. Cir. 1991) (reversing dismissal of the asbestos manufacturers' claims and remanding for a determination as to the availability of a tort action "under the relevant state laws as applied to the government as vessel owner/stevedore"). In asking the Federal Circuit to extend the superior knowledge rule, petitioner is seeking to avoid the limitations on tort recovery from the United States that Congress has established. The fact that Congress has not authorized tort recoveries from the government in cases such as this supports the Federal Circuit's decision not to extend the superior knowledge rule to provide for recovery in contract.

charged that court with primary responsibility for developing federal contract law, see Pet. 8 nn.6, 7, weighs against granting the petition for a writ of certiorari. There is no conflict in the circuits over the scope of the superior knowledge rule and no conflict can develop, and the Federal Circuit has considerable expertise concerning Tucker Act cases. Especially where that court has decided not to depart from settled rules governing government contracting, there is no reason for review by this Court.

Petitioner suggests that review is warranted because the Federal Circuit's decision impedes resolution of the asbestos crisis. Pet. 14-16. However, there is no merit to petitioner's claim that this Court should reverse the asbestos industry's failure to pull into the asbestos litigation the federal taxpayers—who have shouldered a large part of the burden of the asbestos tragedy through excess Social Security payments, compensation payments to federal civilian employees (which are not always recoupable), payments to military personnel, payments for medical research, and abatement programs in the naval fleet and elsewhere. Moreover, this argument amounts to a plea for judicial legislation. In the *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 3 (1991), which is relied upon by petitioner, Pet. 15-16, the Judicial Conference Committee "recognize[d] that virtually all of the issues relating to a so-called 'national solution' are primarily matters of policy for the Congress." In any event, the *Report*, while describing the problems presented by the asbestos litigation in detail, at no point identified the inability of the industry to bring the government into the litigation as an impediment to a solution.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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